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TELEKOM MALAYSIA BHD

v.

MUDAJAYA CORPORATION BHD

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HIGH COURT MALAYA, SHAH ALAM
ROZANA ALI YUSOFF JC
[SUIT NO: 22NCVC-920-07-2012]
2 DECEMBER 2013

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TORT: *Damages - Negligence - Damaged network cables - Whether defendant negligent in carrying out excavation works - Whether duty of care imposed on defendants - Whether defendant breached its duty of care - Whether defendant failed to exercise reasonable and effective safety measures while conducting work - Whether damages caused by defendant's negligence*

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The plaintiff was a telecommunication provider who owned network cables particularly fiber optic and copper cables underneath Jalan Kundang. The defendant was a contractor appointed for a construction project which was located within the plaintiff's vicinity at Taman Kundang. In March 2010, the plaintiff discovered there were malfunction

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and damage to the network cables located along Jalan Kundang. The plaintiff filed an action against the defendant for negligence in causing damage to the plaintiff's cables. It was alleged that the plaintiff suffered loses and the defendant was liable to pay the plaintiff for the amount paid for the rectification works done to the plaintiff's cables. The plaintiff

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claimed a sum of RM733,999.43 for damages caused to their underground cables. The plaintiff also alleged, *inter alia*, that the defendant had failed to take all reasonable, effective and safety measures while conducting the work in order to avoid any damage to the cables. However, the defendant refused to do the rectification works required for the network cables. As such, the plaintiff had to undertake the works

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by itself and had to engage an independent contractor for rectification works. On the contrary, the defendant submitted that there was no breach of duty of care owed to the plaintiff because there was no proof that the plaintiff's network cables were damaged. Further, the defendant asserted that they were not the only party who was involved with the

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construction project at that particular area doing excavation works at that material time. Since the excavation work was conducted based on the map showing the location of the cables given by the plaintiff to the defendant, the defendant had denied any liability for negligence and omission on their part for causing damage to the plaintiff's cables. The

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issue for determination was whether the defendant was negligent in causing damages to the plaintiff's fiber optic cables.

Held (allowing plaintiff's claim with costs):

(1) There was reasonable foreseeability on the part of the defendant as a contractor to take steps and safety precautions as not to damage the cables. The defendant who had undertaken the works should have foreseen that the plaintiff could have laid underground pipes or cables. Furthermore, the defendant's construction works were in close and direct relationship of proximity with the plaintiff. Thus, it is fair, just and reasonable to impose the duty of care on the defendant. (para 20)

(2) The defendant was aware of the cable in the vicinity of the project and the construction works would affect the area where the cables were located, but did not make any enquiries on the exact location or discuss any precautionary measures to be undertaken in order to avoid the risk of damage to the plaintiff's cable. The defendant was supposed to relocate the plaintiff's cable to abate the risk of damage to it before commencing works on the site. There was considerable risk involved because the defendant's construction works included earthworks such as drilling and piling which would invariably have an impact on the plaintiff's cables. Thus, the risk of damaging the plaintiff's cable was reasonably foreseeable and the defendant had failed to take reasonable steps to protect the plaintiff's cables against those risks. (paras 24 & 29)

(3) The defendant was the only contractor working in the same vicinity where the damage was found. Although the defendant alleged that there were other third parties conducting some other works in the same vicinity, there were no evidence brought before the court by the defendant to support such claims. Therefore, the defendant had breached its duty and caused damage to the plaintiff. There was a causal link between the defendant's breach of duty and was liable to the plaintiff's loss. (paras 31 & 32)

(4) The defendant caused the plaintiff's cable to be damaged. As a result, the plaintiff had to rectify the damage to the plaintiff's cables at a cost of RM733,999.43. Thus, the defendant was liable for negligence. Since the quantum of damages was disputed, the court ordered that the damages be assessed by the Senior Assistant Registrar and costs of RM15,000 be awarded to the plaintiff. (paras 35 & 36)

Case(s) referred to:

Caparo Industries Plc v. Dickman [1990] 2 AC 605 ***(refd)***

Donoghue v. Stevenson [1932] AC 562 ***(refd)***

Government Of Malaysia & Ors v. Jumat Bin Mahmud & Anor [1977] 1 LNS 29 FC ***(refd)***

A *Kris Angsana Sdn Bhd v. Eu Sim Chuan & Anor [2007] 4 CLJ 293 CA* ***(refd)***
Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon & Ors [2006] 2 CLJ 1 FC ***(refd)***
Shanmugam Gopal v. Zinal Abidin Nazim & Anor [2003] 8 CLJ 729 HC ***(refd)***
Telekom Malaysia Bhd v. Daya Timur Construction Sdn Bhd [2013] 3 CLJ 467 HC ***(refd)***
B *Tenaga Nasional Berhad v. Trans Resources Corporation Sdn Bhd & Anor [2009] 1 LNS 516 HC* ***(refd)***
Tenaga Nasional Bhd v. Tetuan Ariff & Co [2014] 1 CLJ 1112 HC ***(refd)***

For the plaintiff - Tan Wei Yi; M/s Wong & Partners
For the defendant - Shobana; M/s Jayadeep Hari & Jamil
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Reported by Sandra Gabriel

JUDGMENT

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Rozana Ali Yusoff JC:

Introduction

[1] This is a claim by the plaintiff for damage caused to their
E underground cables by the defendant. The plaintiff asserted that the damage was resulted from the defendant's negligence. The claims as prayed for in the re-amended statement of claim are as follow:

(a) A sum of RM733,999.43 to be awarded as damages;

F (b) Interest for the sum allowed at the rate of 4% per annum from the date of the judgement until the date of realisation or to another date and rate which the court deemed fit;

(c) Costs; and

G (d) As well as other reliefs that the court deemed fit.

Background Facts

[2] The plaintiff is a company incorporated in Malaysia with a registered address at Level 51, North Wing Menara TM, Jalan Pantai
H Baharu, 50672 Kuala Lumpur. The plaintiff is a telecommunication provider who at all material times owned network cables particularly fiber optic and copper cables underneath Jalan Kundang located in the vicinity of the Ibusawat TM Kundang, Jalan Kundang.

I **[3]** The defendant is a company incorporated in Malaysia with a registered address at No 17, Jalan Semangat, Petaling Jaya, 46100 Selangor. The defendant is a contractor appointed for the construction of the project which was located in the vicinity of the plaintiff's one of many branches ie, TM Kundang Jalan Kundang.

[4] At all material times, the defendant was a contractor for a project known as the "Design and Build of the KL-Kuala Selangor Expressway (KLSE) Package 1 – Assam Jawa to Kundang (Ch 0 to Ch 17,600) and Package 2 – Kundang to Taman Rimba Templer (Ch 17,600 – Ch 29,900).

[5] The defendant was carrying earthworks such as excavation, drilling and piling by removing the soil under the PVC ducts containing the cables around January 2010 to May 2010. In March 2010 the plaintiff discovered there were malfunction and damage to the network cables located along Jalan Kundang.

[6] The defendant refused to do the rectification works required for the network cables. The plaintiff had to undertake the works by itself and had to engage an independent contractor for rectification works and charged the same back to the defendant as per the amount claimed in this suit.

Submission By The Plaintiff

[7] The plaintiff alleged that the earthworks had damaged the plaintiff's cables and consequently plaintiff suffered losses. Plaintiff also alleged that the defendant had failed to conduct a thorough research before commencing the project so as to avoid from causing any sort of damages to the cables.

[8] The plaintiff also alleged that the defendant has failed to take all reasonable, effective and safety measures while conducting the work in order to avoid any damage to the cables as well as the defendant and its workers and agent had failed to use their expertise and diligence to prevent from causing any damage to the cables.

[9] Plaintiff also claim that there was no prior approval obtained by the defendant before commencing the earthworks such as excavation, drilling and piling in the said area.

[10] The plaintiff filed an action for defendant's negligence in causing damage to the plaintiff cables and thereby the plaintiff had suffered losses. The defendant remains liable to pay the plaintiff for the amount paid for the rectification works done to the plaintiff's cables.

Submission By The Defendant

[11] The defendant submits that there was no breach of duty of care owed to the plaintiff because there was no proof that the plaintiff's network cables were damaged. Even if there was any damage, the defendant was not responsible for the damage. The defendant asserts

that they were not the only party who was involved with the construction project at that particular area and at that material time. This was because there was another project handled by SYABAS (Syarikat Bekalan Air Selangor) and Tenaga Nasional at that material time doing excavation works. The defendant submits that the plaintiff was uncertain as to who, what, and how the damage was caused to their network cables.

[12] The excavation work was conducted based on the map showing the location of the cables given by the plaintiff to the defendant. Therefore the defendant had denied any liability for negligence and omission on their part for causing damage to the plaintiff cables.

[13] The defendant submits that the plaintiff had failed to prove their claim on the balance of probabilities both on the issue of liability and quantum.

Findings Of The Court

[14] The plaintiff's cause of action against the defendant is founded upon alleged negligence that the defendant's actions and/or omission has resulted in the damage to the plaintiff's network cables at or about TM Kundang while the defendant was designing and building an overhead bridge for the KL – Kuala Selangor Expressway.

[15] The only issue to be decided before this court is whether the defendant was negligent in causing damages to the plaintiff's fiber optic cables which were located at Jalan Kundang and in its vicinity during the excavation works. There are four elements of negligence as defined as a legal concept. The first is the duty of care. This means that someone must take reasonable steps at making sure someone can't get hurt from their actions and/or omissions. The next is a breach of the duty of care. This means that if you do something that has caused damage to someone else, you have breached the duty. The third element of negligence is factual causation. This is where it has to be proven that negligence happened. The last element of negligence is damages.

Duty Of Care For The Defendant

[16] Defendant was a contractor appointed by a third party for the construction of a project located in the vicinity of the plaintiff's one of many branches ie, TM Kundang, Jalan Kundang whereby the construction involved some earthworks particularly excavation and back piling works.

[17] The Federal Court in *Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon & Ors* [2006] 2 CLJ 1 at p. 17 to 18, confirmed the general duty of care test that was enunciated in *Caparo Industries PLC v. Dickman* [1990] 2 AC 605, the House of Lord held that to establish a duty of care, a plaintiff must be able to show that:

(a) There is a reasonable foreseeability;

(b) There must be a close and direct relationship of proximity between the parties; and

(c) It must be fair, just and reasonable to impose a duty of care.

[18] In *Kris Angsana Sdn Bhd v. Eu Sim Chuan & Anor* [2007] 4 CLJ 293, the defendant, its staff or agent had commenced construction works extensively on a project site. Amongst the construction works carried out on the said site were piling works. Next door was the plaintiff's house. Due to the negligent construction work, the respondent's house suffered structural damage, resulting in cracks appearing on the floor, walls, columns and beams of the property. All these damages had threatened the respondents' safety and the occupants of the said house. The Court of Appeal held that the defendant owed the plaintiff a duty of care but had failed to perform it and damages ensued resulting from that failure.

[19] From the evidence and witnesses testimonies, it is clearly shown that the defendant was working at the same vicinity where the damage was found within the period of January 2010 to May 2010. The defendant was fully aware that there were plaintiff's cables in and surrounding the work place. In fact the defendant has admitted to excavating and removing the soil from under where the cables were located. It was further admitted by the defendant's witnesses that defendant has improvised several beams to support the exposed and hanging cables after the excavation works were completed. There were no evidences adduced by the defendant that at the material time there were others third parties present in the vicinity conducting excavation or back-piling works or any other works that were related to the cables. In fact the defendant was the only contractor at that time carrying work in the area.

[20] At this juncture the court finds there was a reasonable foreseeability on the part of the defendant as a contractor to take steps and safety precautions as not to damage the cables. In other word, the defendant who had undertaken the works should have foreseen that the plaintiff as a public utility companies could have laid underground pipes or cables. Furthermore the defendant's construction works were in close and direct relationship of proximity with the plaintiff. Thus, it is fair,

just and reasonable to impose the duty of care on the defendant. The defendant clearly owed a duty of care to the plaintiff whereby the defendant failed or did not take precautionary measures in order to reasonably avoid damaging the plaintiff's cables.

Breach Of Duty Of Care

[21] In *Government Of Malaysia & Ors v. Jumat Bin Mahmud & Anor* [1977] 1 LNS 29; [1977] 2 MLJ 103, the Federal Court at p. 104 decided "… in considering whether or not the appellants were in breach of their duty of care to the plaintiff it was necessary for the trial judge to consider first whether the risks of injury to the plaintiff were reasonably foreseeable and secondly, assuming it was, whether the appellants took reasonable steps to protect the plaintiff against those risks."

[22] It was not disputed that the defendant was excavating and removing the soil underneath where the cables were located within the period of January 2010 to May 2010 and the damage of the cables were discovered in March 2010. The plaintiff led evidence through witnesses that the earthworks carried out by the defendant had caused the soil erosion. The defendant also dug out the earth under and around the PVC ducts containing the cables.

[23] PW1 – Puan Musalmah binti Ali, Network Development Manager of the plaintiff, testified that any party prior to commencing construction works such as excavating and back-filling must submit their layout plan and proposed relocation plan, failing which the consultant of the contractor will not be able to identify whether there are underground cables. They will know about this once the plan is approved. At the same time the contractor will be able to properly relocate the cables so that it will not interfere with the construction or otherwise damage the cables. As such, the plan to relocate the plaintiff's cables was necessary. In this instant case, the defendant did submit the plan, but they commenced work before the approval was obtained. DW1 – Mr Ooi Peng Hin, Assistant General Manager of the defendant, during cross-examination admitted that the defendant carried out earthworks without notifying or obtaining the plaintiff's approval.

[24] Thus, the risk of injury to the plaintiff is foreseeable in that if the defendant did not execute earthwork with care there will be damage to plaintiff's cables. The construction works would affect the area where the cables were located. The defendant was aware of the cable in the vicinity of the project. However the defendant did not make any enquiries on the exact location or discuss any precautionary measures to be undertaken in order to avoid the risk of damage to the plaintiff's cable.

[25] According to PW3 – Vijaya Sundram a/l R Karuppiah who is a special grade technician of the plaintiff, the removal of soil from under and around the PVC ducts containing the cables by the defendant has caused the cables to be suspended without supports. This subsequently resulted to the cables to crack and break at the joints. Once the cables joints on the PVC ducts were broken, pressure escapes and the cable contained in PVC ducts were exposed to the element of water and moisture and eventually caused the damage to the plaintiff's cables.

[26] Following of the discovery of the damage, representative of the plaintiff met the defendant's representative at the site of the damage. The purpose of the meeting was to discuss the damage caused by the defendant. DW1 admitted to PW1 that the damage to the cables was caused by the defendant and they undertook to remedy the damage caused. Subsequent to the meeting, PW1 issued an email to the defendant's representative to confirm the discussion at the site meeting. Although DW 1 replied the email and promised to start work as soon as possible by constructing culverts and 12 new civil ways but failed to do so. Instead the defendant continued to expose the cables and subsequently led to further damage.

[27] In *Telekom Malaysia Bhd v. Daya Timur Construction Sdn Bhd* [2013] 3 CLJ 467. The High Court held that:

> … Contractors who undertake works in the city should have foreseen that public utility companies could have laid underground pipes or cables. This is because the law authorises various public utility bodies or companies to legally encroach upon any land, private or public, to lay pipes or cables for a public purpose. The defendant was conducting piling works in an urban area which was formerly not within the compound of his employer. The area in question was in the middle of the city and piling was done near a public road. For that reason, a reasonable contractor would have foreseen that the pipes and cables could have been laid underground and would have made enquiries with his employer or the relevant public utility bodies or companies before proceeding with the piling or drilling works.
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> … Therefore it should have been within the defendant's contemplation that there could be underground pipes or cables in the area. DW1 did not even tell the court whether the defendant had made any proper enquiries with the management of PFM about underground pipes or cables.
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> … A reasonable contractor would have foreseen that the pipes or cables could have been laid underground and would have made enquiries with his employer or the relevant public utility bodies or companies before proceeding with the piling or drilling works.

> … A reasonable person, especially a contractor, should have foreseen the existence of the cables in question. In the premises, the failure of the defendant to make a way leave application or make any other enquiry in respect of underground cables constituted a breach of duty of care that is owed to the plaintiff.

[28] In *Tenaga Nasional Berhad v. Trans Resources Corporation Sdn Bhd & Anor* [2009] 1 LNS 516, the High Court held that:

> … The defendants here were aware of the plaintiff's cable and had been advised of measures to protect the cable from damage. The defendant's act in damaging the cable due to the piling works constituted *prima facie* evidence of negligence. In such case, the burden was then on the defendant's to introduce evidence to explain and show that the damage occurred without any negligence on their part ...

[29] From the evidences adduced, the defendant was supposed to relocate the plaintiff's cable to abate the risk of damage to the cables before commencing works on the site. There is considerable risk involved because the defendant's construction works included earthworks such as drilling and piling which would invariably have an impact on the plaintiff's cables. The court is satisfied that risk of damaging the plaintiff's cable is reasonably foreseeable and the defendant has failed to take reasonable steps to protect the plaintiff's cables against those risks.

Factual Causation

[30] In order to prove causation, there must be proof that the defendant's actions actually led to the harm suffered by the plaintiff. The element of causation is broken down into two separate issues – cause in fact and proximate cause. If the harm would not have occurred without the wrongful act, then the act is the cause in fact. To prove proximate cause, there must be a close connection between the wrongful act and the harm caused. The harm that resulted must have been foreseeable from the wrongful act. The requirement of proximity broadly corresponds to the second limb of Lord Atkin's neighbour principle in *Donoghue v. Stevenson* [1932] AC 562, which asks whether the claimant's are so closely and directly affected by [the defendant's] act that [the defendant] ought reasonably to have them in "contemplation as being so affected".

[31] The evidences before this court revealed that the defendant was the only contractor working in the same vicinity where the damage was found within the period of January 2010 to May 2010. Although the defendant alleged that there were other third parties conducting some other works in the same vicinity but there were no evidence brought before this court by the defendant to support such claims. The

defendant admits to excavating and removing the soil from under where the cables were located and was aware of the cables. In fact from the evidence, the defendant undertook to make good of the damaged cable.

[32] The court is satisfied that the defendant has breached its duty and that the defendant had caused damage to the plaintiff. The court on the balance of probabilities is satisfied that there is a causal link between the defendant's breach of duty and is liable to the plaintiff's loss.

Damages

[33] In *Tenaga Nasional Bhd v. Tetuan Ariff & Co* [2014] 1 CLJ 1112, the High Court held that:

> Damage is an essential element in a cause of action for negligence (see *Pegasus Management Holdings SCA and another v. Ernst & Young* (a firm) *and another* [2010] EWCA Civ 181, CA; and *Law Society v. Sephton & Co* (a firm) *and others* [2006] 2 AC 543, HL). In this regard, plaintiff must show loss to have actually occurred and that it is recoverable before an award of damages can be made (see *Popular Industries Ltd v. The Eastern Garment Manufacturing Co Sdn Bhd* [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635; and *Penang Port Commission v. Kanawangi Seperumaniam* [1997] 1 CLJ 423; [1996] 3 MLJ 427). Therefore, in order to found a case in negligence, it is necessary for the plaintiff to prove that it has suffered damages that are recoverable and establish the causal link between the defendant's breach of duty and the plaintiff's loss.

[34] The basic idea behind damages is that the plaintiff should be restored – in the form of money – to his or her original position before the negligence occurred.

[35] By reason of the aforesaid negligence the defendant, its servant and/or agent caused the plaintiff cable to be damaged. As a result of the damage caused by the defendant, the plaintiff had to rectify the damage to the plaintiff's cables at a cost of RM733,999.43.

Liability

[36] On the balance of probabilities the plaintiff had proven their case and the court finds that the defendant is liable for negligence and damages to be awarded to the plaintiff.

Quantum Of Damages

[37] In *Shanmugam Gopal v. Zinal Abidin Nazim & Anor* [2003] 8 CLJ 729, the High Court held that:

> General damages which are awarded for a tortious act committed against a person or his property is a civil remedy which has as its aim to put the injured party back as it were, as far as possible to his

A original position maintained by him prior to the tortious act which resulted in injury or damage. There can be no better definition of general damages than that by Syed Agil Barakbah FJ when he said in *Ong Ah Long v. Dr S Underwood* [1983] 2 CLJ 198; ([1983] CLJ (Rep) 300) at pp. 202-207 (p. 314).

B **[38]** The plaintiff led evidence through PW4 – Padmanathan a/l Sambasivam, Manager of Network Operation Unit Recovery Work Order on the damages it suffered totalling RM733,999.43 for remedying the fiber optics and copper cables inclusive of labour, material and miscellaneous. However, the defendant challenged the payment advice/
C invoices of contractor hired by the plaintiff to carry out rectification works and the management fees. The plaintiff respectfully submitted that judgment to be entered on liability against the defendant and agreed for the damages to be assessed. Since the quantum of damages is disputed the court ordered that the damages to be assessed by the Senior
D Assistant Registrar and costs of RM15,000 be awarded to the plaintiff.

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